IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

CIVIL REVISION APPLICATION NO. 44 OF 2004.

1) Mr.Philip Kaitan,

aged 6t years, Occu. Pensioner,

2) Mrs.Dorothy Philip Kaitan,

Aged 65 years, Occu. Housewife

Both r/at S.No.130/1, Plot No.10,

R.A. Road, Shingve Road-Babula,

Deolalil Camp, Nasik. .... Petitioners.

V/s

Shri Ramkishanchand Wadhwa

Age 50 years, Occu. Business,

R/at Wadhwa Cottage, Anand Road,

Deolali, Nasik .... Respondent.

Mr.S.M.Gorwadkar for the petitioners.

Mr.Milind M. Sathaye for respondent.

CORAM: R.M.S. KHANDEPARKAR, J.

16-12-2004

ORAL JUDGMENT:

Heard the learned advocates for the parties.

Rule. By consent rule made returnable forthwith.

2. The Petitioner challenges judgment and order dated 6.12.2003 passed by the Civil Judge, Junior Division, Nashik in Regular Civil Suit No.284 of 2000 whereby the petitioner has been directed to put the respondent in possession of the suit premises.

3. The facts in brief relevant for the decision of this case are that the respondent herein, claiming to have been put in possession of the suit premises pursuant to lease granted in respect thereof by the petitioner for a period of 18 months commencing from 29.10.1999 on monthly rent of Rs.500/-, complaining of dispossession therefrom otherwise than in due process of law therefrom by the petitioner on 2.5.2000 filed the suit for restoration of possession under section 6 of the Specific Relief Act. It was the case of the respondent that though premises were let out for residential purposes as they were not fit to be used for that purpose he was permitted to use the same as godown by the petitioner and accordingly the suit premises were being possessed by the respondent since October, 1999. It was his further case that on account of paucity of funds to complete the construction work the petitioner agreed to sell the suit premises to the respondent for consideration of Rs.3 lacs under an agreement dated 1.11.1999 and pursuant thereto the petitioner did not claim rent in respect of suit premises from the respondent after October, 1999. On 10.5.2000 when the respondent had been to the suit premises to fetch building material stored therein, to his surprise, he saw that the lock put by the respondent to the suit premises was broken open and replaced by new lock by the petitioner after trespassing into the suit premises. He thereupon came to know that the acts of trespass on the part of petitioner in the suit premises had taken place on 2.5.2000

on which day the respondent was dispossessed from the suit premises by the petitioner otherwise than due process of law. The respondent therefore filed said suit on 3.10.2000 claiming restoration of possession under section 6 of the Specific Relief act. The suit was contested by the petitioner denying the claim of the respondent including in relation to the agreement referred to by the respondent claiming the same to be bogus. It was the case of the petitioner that the possession of the suit premises was never with the respondent and the allegation regarding dispossession of the respondent from the suit premises were totally false. It was the case of the petitioner that the premises were all throughout in possession of the petitioner. Dispute was sought to be raised even in relation to the market value of the suit premises and therefore the valuation clause in the plaint contending that the market value of the suit premises is more than Rs.5 lacs.

4. During the course of trial of the suit the respondent produced evidence in the form of affidavit in terms of provisions of Order 18 Rule 4 of Code of Civil Procedure along with copy of the agreement of lease and the copy of the complaint dated 15.5.2000 which was lodged by the respondent with Devlali Camp police station regarding the alleged dispossession of respondent form the suit premises. No evidence was led on behalf of the petitioner and the suit came to be decree by the impugned judgment. Hence the present petition.

5. While challenging the impugned judgment the learned advocate appearing for the petitioner has submitted that the suit as filed was not for mere restoration of possession in terms of provisions of law comprised in section 6 of the Specific Relief Act

but in fact it was a suit claiming for restoration of possession of the property on the ground that the plaintiff who is the lessor in respect of the suit premises has been illegally dispossessed therefrom and therefore considering the provisions of section 33 of the Maharashtra Rent Control Act, 1999 Civil Court had no jurisdiction to entertain such a suit and on that count itself the impugned judgment is liable to be set aside. It was his further contention that the valuation of the relief asked for in the suit and taking into consideration the provisions of Suit Valuation Act and the Bombay Court Fees Act it is apparent that the relief sought for was for restoration of the premises claimed by the respondent as a lessee who has claimed to have been illegally dispossessed from the leased premises and that being so, provisions of section 33 of the Maharashtra Rent Control Act 1999 were clearly attracted and on that count also the Civil Court could not have entertained the suit. It is his further contention that even on merits there was absolutely no case for directing restoration of possession under section 6 of the Specific Relief Act as the respondent had failed to establish that he was dispossessed within the six months prior to the date of institution of the suit and this is also apparent from the impugn;ed judgment which does not disclose any finding on the point that the respondent had been able to establish that he was dispossessed from the suit premises within six months prior to the date of institution of the suit. Further contention is that the Court below while decreeing the suit acted in contravention of provisions of law in relation to the service of notice to the parties in as much as that though on 8.8.2002 issues were framed in the suit, the advocate appearing for the petitioner was allowed to withdraw his appearance on 13.2.2003 without any prior notice to the petitioner in that behalf and as far as the notice issued in that regard subsequent thereto i.e. On 12.3.2003, there is no

material on record about service of the same on the petitioner and in fact according to the petitioner the said notice was never served upon the petitioner. He has also submitted that the suit was transferred from one court to another in September, 2003 and notice in that regard appears to have been issued on 19.9.2003 but the same was neither received by the petitioner nor there is anything on record to show that it was actually served upon the petitioner. Reliance is sought to be placed on the decision in the case of ***Dhannalal*** v. ***Kalawatibai & Ors.,*** 2002 (6) SCC 16. On the other hand the learned advocate for the respondent has submitted that in a suit under section 6 of the Specific Relief Act what is relevant to be seen is whether the plaintiff was in possession prior to the date of his dispossession from the suit premises as has been claimed by him in the plaint and whether the suit has been filed within the period of limitation prescribed under the law and question of character of possession or the right of the party to be in possession are of no importance and merely because certain facts are pleaded in that regard or brought on record they could be of any consequence in the matter and the same can not be a justification to deny the right which the plaintiff is entitled to exercise in terms of section 6 of the Specific Relief Act. He has further submitted that in such a case provisions comprised in section 33 which are in pari materia with section 28 of the Bombay Rent (Hotel & Lodging House) Rates Control Act, 1947 are not at all attracted and reliance is placed in that regard on a decision in the case of ***Smt.Faijulbee Hajeel & Ors.*** v. ***Yadali Amir Shaikh Ansari,*** AIR 1984 Bom. 290 as well as ***Shiavax C. Cambata*** v. ***Sunderdas Ebji,*** 1950 (52) BLR 381 as also of the Gujrat High Court in the case of ***Bai Dahi*** v. ***Amulakhbhai Gambhirbhai Barot,*** AIR 1974 Gujarat 106. He has further submitted that the fact that the respondent was in possession clearly established by the agreement of

lease which was executed in the month of October, 1999 and further by an agreement of sale executed in November, 1999. According to the learned advocate for the respondent his complaint dated 15.5.2000 also reveals that he came to know about dispossession from the suit premises on 10.5.2000 and that dispossession had taken place on 2.5.2000. Those facts having been clearly stated on oath, and there being no evidence to the contrary on record, learned advocate for the respondent submits that factum of dispossession of respondent on 2.5.2000 has been fully established. According to the learned advocate for respondent the agreement which bore the signatures of the parties coupled with the statement on oath by respondent is sufficient to establish the fact about dispossession of respondent from the suit premises on 2.5.2000. He has also submitted that the valuation clause in the plaint nowhere discloses the same has been valued as a suit by the lessee against the lessor. The clause merely discloses that the suit was valued at Rs.6600/- and accordingly court fees of Rs.980/- has been paid. Considering the fact that the rent was monthly Rs.500/- the annual rent would be Rs.6000/- which would be the value of the suit for the purposes of payment of court fees in case of a suit by the lessee against the lessor in terms of provisions of section 6(12) (f) of the Bombay Court Fees act and considering the same the valuation which discloses at Rs.6600/- cannot be said to be a valuation in a suit by the lessee against the lessor.

6. Though the impugned judgment is sought to be challenged on various counts it is not necessary to refer to all the grounds sought to be taken by the petitioner in the matter. It is well settled that in the suit for restoration of possession under section 6 of the Specific Relief Act two facts are relevant; firstly the factum of dispossession of

the plaintiff from the suit premises and secondly the suit should be filed within a period of six months from the date of dispossession from the suit premises. A perusal of impugned judgment discloses that the finding regarding dispossession in case in hand has been arrived at solely on the basis of the agreement of lease. Undisputedly neither the affidavit filed by the respondent in terms of Order 18 Rule 4 of Code of Civil Procedure discloses any fact which could establish the claim of the respondent about the dispossession from suit premises on 2.5.2000 nor there is any other material placed on record in support of the said claim and to prove that in fact the respondent was in possession of the suit premises till 2.5.2000. Even assuming that he was in possession pursuant to the agreement of lease dated 29.10.1999 the analysis of materials on record and the finding arrived at by the trial Court on these aspect read thus :

> "He produced on record lease agreement at Exh.3/2. This term and condition No.2 of lease agreement discloses that the lease was for the period of 18 months from the date of the agreement. It was executed on 29h October 1999. On the basis of this lease deed, the plaintiff was entitled to have possession of the suit premises till April, 2001. The Plaintiff stated that he was dispossessed on 2/5/2000, i.e. 11 months prior to expiry of duration of lease. In backdrop of this evidence on record, it can well be held that the Defendant dispossessed the Plaintiff from the suit property illegally."

7. Obviously the finding regarding possession of the respondent in relation to the suit premises has been arrived at on the basis of agreement dated 29.10.1999. The

trial Court has not referred to any other material on record which could disclose that pursuant to the agreement dated 29.10.1999 the respondent was factually put in possession of the suit premises. It is pertinent to note that the petitioner in the written statement had categorically denied the claim of the respondent regarding possession of the suit premises and had further made a categorical statement that the suit premises were never in possession of the respondent and the same were always in possession of the petitioner. That being so, it was primarily necessary for the respondent to establish that the respondent was put in possession of the suit premises prior to 2.5.2000 the day on which he claims to have been dispossessed therefrom. In the absence of any evidence in that regard merely because there was an agreement dated 29.10.1999 that by itself would not be sufficient to arrive at a finding that the respondent was in actual possession of the suit premises prior to 2.5.2000.

8. The finding as regards the dispossession on 2.5.2000 has been arrived at solely on the basis of the statement of respondent in that regard. Undoubtedly there has been also reference to the agreement dated 29.10.1999 being for 18 months and therefore it was to expire 11 months after 2.5.2000. In other words, the statement of the respondent regarding dispossession on 2.5.2000 was sought to be corroborated solely by the agreement dated 29.10.1999. As already observed above unless the respondent had established that he was put in possession of the suit premises by virtue of agreement dated 29.10.1999 there was no occasion for the trial Court to hold that by virtue of the said agreement itself it can arrive at a finding that the respondent was dispossessed from the suit premises on 2.5.2000. Apparently apart from mere claim on behalf of the

respondent that he was put in possession of the premises on 29.10.1999 and thereafter dispossessed therefrom on 2.5.2000 there is absolutely no evidence on record and that too when such a claim is clearly disputed and denied by the petitioner in his written statement. Obviously the initial burden regarding proof of possession and dispossession of the respondent in relation to the suit premises was not discharged by the respondent and therefore though the petitioner had not led evidence in the matter onus never shifted upon the petitioner to prove that the respondent was not in possession of the suit premises or that he was not dispossessed on 2.5.2000.

9. The materials on record therefore were not sufficient to hold about the illegal dispossession of the respondent from the suit premises apart from the fact that the Court below as rightly pointed out by the learned advocate for the petitioner, has nowhere arrived at a finding that such dispossession was on 2.5.2000. Such a finding was also necessary in order to order restoration of the possession as the suit was admittedly filed on 3.10.2000. It was therefore necessary for the respondent to establish that the fact of dispossession had taken place within six months prior to 3.10.2000 and the respondent having failed to establish the same the trial Court could not have decreed the suit and could not have directed restoration of the suit premises to the respondent.

10. The respondent has totally failed to establish his case regarding possession and dispossession of the suit premises for the purposes of relief under section 6 of the Specific Relief Act and therefore the impugned decree passed by the trial Court cannot be sustained and is liable to be quashed and set aside. In the facts and circumstances of

the case, therefore, it is not necessary to address to other issues sought to be raised by the parties. Needless to say that all the observations made herein are in relation to the claim of respondent under section 6 of the Specif Relief Act.

11. In the result, therefore the petition succeeds. The impugned judgment of trial Court is therefore hereby quashed and set aside. The Suit filed by the respondent under section 6 of the Specific Relief Act is hereby ordered to be dismissed and the trial Court is directed to issue decree in that regard. Rule is made absolute in above terms with no order as to costs.